

1 M. VAN SMITH  
2 State Bar No. 32007  
3 1696 Mendenhall Drive  
4 San Jose, California 95130  
5 Telephone (408) 364-1062  
6 Attorney for Plaintiff  
7 ISAAC TANNER

8 **THE UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**

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11 **ISAAC TANNER,** **No. C07-02392 JL**  
12 **Plaintiff,**  
13 **vs.** **NOTICE OF MOTION AND MOTION**  
14 **PODS, INC. a corporation, et al.,** **TO REMAND**  
15 **Defendants.** **Date: July 11, 2007**  
16 **Time: 9:30 a.m.**  
17 **Courtroom F, 15<sup>th</sup> Floor**  
18 **Honorable James Larson**

19 TO: DEFENDANT AND TO ITS ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that at the date, time and department specified above, at 450  
21 Golden Gate Ave., San Francisco, California 94612, the motion of Plaintiff Isaac Tanner for an  
22 order that the case be remanded will be heard. Plaintiff requests the court to remand the case to the  
23 Superior Court.

24 The motion will be based on the ground that the Notice of Removal of the case to the United  
25 States District Court was untimely, being filed more than 30 days from the date that is was  
26 ascertainable that the complaint could be removed.

27 Dated: June 4, 2007

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M. VAN SMITH  
Attorney for Plaintiff

MEMORANDUM

I. STATEMENT OF FACTS

In January 30, 2007, M. Van Smith, counsel for Plaintiff, sent a copy of the summons and complaint to Brian Burks. Mr. Burks was the employee of PODS, Inc. who supervised Plaintiff.

In a letter dated March 1, 2007, Ian P. Fellerman, counsel for Defendant Pods, Inc. wrote a letter to counsel for Plaintiff. Mr. Fellerman stated, "The statements attributed to Mr. Burks in the Complaint are inaccurate and taken out of context." A copy of the letter is attached as Exhibit A to the Declaration of M. Van Smith in Support of Motion for Remand.

The Notice of Remand was filed on May 2, 2007.

II. STATEMENT OF ISSUE

Section 1446(b) of Title 28 requires that a notice of removal be filed within 30 days after receipt by the defendant by service or otherwise a of the initial pleading. Defendant received a copy of the complaint by Notice and Acknowledgment by March 1, 2007. The Notice of Removal was filed on May 2, 2007, more than 30 days after Defendant received a copy of the complaint. The issue is whether the 30 days in which the to file a notice of remand began when Defendant had received a copy of the complaint rather beginning to run when Defendant was served.

III. ARGUMENT

Section 1446 of Title 28, United States Code, governs the procedure for removal of actions to federal court. Section 1446(b) provides in relevant part: "The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever is shorter. If the case stated by the initial pleading is removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other papers from which it may first be ascertained that the case is one which is or has become removable \* \* \*."

Removal is permitted were the basis for federal jurisdiction may be ascertained from the face

1 of a well-pleaded complaint. *Franchise Tax Bd. of California v. Construction Laborers Vacation*  
 2 *Trust*, 463 U.S. 1, 9 – 10 (1983).

3 There is an affirmative burden on the defendant to exercise diligence since the failure to  
 4 timely recognize a basis for removal may result in loss of that option. See, e.g., *Yankee Bank v.*  
 5 *Hanover Square Assoc.* (N.D.N.Y. 1988) 693 F. Supp. 1400, 1410 (noting Congressional intent  
 6 underlying section 1446(b) that removal be carried out at the earliest possible point and hence the  
 7 clock begins to run “at such time as the removing party \* \* \* had actual notice of the state  
 8 proceeding, the nature of it, the issues involved and the parties involved”).

9 Defendant assumed that the complaint had to be formally served before 30-day period for  
 10 removal began. However, it is not required that the complaint be formally served. *Tech-Hills*  
 11 *Assoc. v. Phoenix Home Life Mut. Ins. Co.* (6<sup>th</sup> Cir, 1993) 5 F.3d 963; *Roe v. O’Donohue* (7<sup>th</sup> Cir.  
 12 1994) 38 F.3d 298, 303-304; *Lofstrom v. Dennis* (N.D. Cal. 1993) 829 F. Supp. 1194, 1197.


13 A copy of the complaint was received. This was shown by the letter from counsel referring  
 14 to the allegations of the complaint. If Brian Burks, the addressee of the cover letter, was not  
 15 authorized to accept service, he was authorized to receive a complaint and counsel was authorized  
 16 to receive the complaint.

17 The filing of the petition for removal on May 2, 2007, was untimely.

#### 18 IV. ATTORNEY’S FEES

19 Plaintiff requests attorney’s fees pursuant to 28 U.S.C. §§ 1446 and 1447 where an action  
 20 has been improperly removed to a federal court. The amended version of § 1447© provides in part  
 21 that: “An order remanding the case may require payment of just costs and any actual expenses,  
 22 including attorney fees, incurred as a result of the removal.” Plaintiff requested that Defendant  
 23 stipulate to a remand before filing this case. The attorney’s fees for preparing this motion could  
 24 have been avoided. In accordance with the Local Rule, Plaintiff has prepared a separate motion.

25 Dated: June 4, 2007.

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 27 M. VAN SMITH  
 28 Attorney for Plaintiff